82-519

Office - Supreme Court, U.S.
FILED
SEP 22 1982
ALEXANDER L. STEVAS
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOSEPH P. COUNIHAN, JR., As Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, for the benefit of said Estate and himself Individually, and for the benefit of JOSEPH P. COUNIHAN, ANNE COUNIHAN, SHEILA COUNIHAN WINDERS, and DEBRA COUNIHAN CARROLL,

Appellants,

VS.

DEPARTMENT OF TRANSPORTATION OF GEORGIA; CHATHAM COUNTY COMMISSIONRS; JOE E. LAMBRIGHT, Individually, and as Chatham County Administrator; HUDSON WISE, Individually and as Administrator of Chatham County Public Works; and AL ST. LAWRENCE, Individually and as Chief of Chatham County Police,

Appellees.

JURISDICTIONAL STATEMENT

ON APPEAL FROM
THE COURT OF APPEALS OF GEORGIA

Michael J. Bowers
Attorney General of Georgia
and
Fred S. Clark
Chatham County Attorney
Counsel of Record
For Appellees

Joseph B. Bergen
Counsel of Record
For Appellants
125 Habersham St.
Savannah, Georgia
31401
912/233-6600

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1981

JOSEPH P. COUNIHAN, JR., As Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, for the benefit of said Estate and himself Individually, and for the benefit of JOSEPH P. COUNIHAN, ANNE COUNIHAN, SHEILA COUNIHAN WINDERS, and DEBRA COUNIHAN CARROLL,

Appellants,

VS.

DEPARTMENT OF TRANSPORTATION OF GEORGIA; CHATHAM COUNTY COMMISSIONERS; JOE E. LAMBRIGHT, Individually, and as Chatham County Administrator; HUDSON WISE, Individually and as Administrator of Chatham County Public Works; and AL ST. LAWRENCE, Individually and as Chief of Chatham County Police,

Appellees.

APPEAL FROM THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

JURISDICTIONAL STATEMENT

I

QUESTIONS PRESENTED

The United States Court of Appeals for the State of Georgia sustained Motions to Dismiss a wrongful death action brought against the Department of Transportation of Georgia, Chatham County Commissioners, Chatham County Police Chief, Chatham County Administrator, and Chatham County Public Works Chief for damages caused by these public bodies and public officials negligently failing to maintain a bridge in Chatham County, Georgia, and maintaining a nuisance on this bridge that caused the death of Ann Fahey Counihan. The dismissal of this action by the Superior Court of Chatham County was on the ground of sovereign immunity.

The question presented is whether Ga.Code Sec. 95A-304 providing that the

Department of Transportation may be sued in such actions, as permitted by law; and whether Ga.Code Sec. 95A-305 providing that the Department of Transportation shall defend any suit for damages in a cause of action accruing on a public road brought against any county under existing laws, are unconstitutional in view of Ga.Code. Sec. 69-301 providing that municipal corporations shall be liable for neglect to perform or for improper or unskillful performance of their ministerial duties, as a denial of due process and equal protection of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and, Article I, Secs. I and II of the Constitution of the State of Georgia, as codified in Ga.Code. Secs.2-101 and 2-203, in that Ga.Code. Secs.95A-304 and 95A-305 fail to provide that counties of the State of Georgia

shall be liable for neglect to perform or for improper or unskillful performance of their ministerial duties and to permit suits for such negligence against counties as does Ga.Code . Sec.69-301 holding municipal corporations liable and permitting suits for such negligence.

II

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III.

OPINION BELOW

The decision of the Court of Appeals of Georgia dated April 21, 1982 (Appendix A infra.) is reported at 162 Ga. App. 374 (___S.E.2d__).

IV

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(a) Nature of the Proceedings.

This is an Appeal from the decision of the Court of Appeals of Georgia that denied a right of action against the Department of Transportation of Georgia; the Chatham County Commissioners; the Chatham County Police Chief; the Chatham County Administrator; and the Chatham County Public Works Chief for wrongful death by reason of the negligences on the ground that these public parties and public

officials are immune from suit by reason of sovereign immunity as no Georgia statutory permission exists to allow such a suit. The Appellants submit that the Georgia Statutes pertaining to suits against these public parties and public officials are unconstitutional in that they deny due process and equal protection of laws in violation of the Fifth and Fourteen Amendment to the Constitution of the United States and the Constitution of the State of Georgia which presents a substantial federal question.

(b) Judgment sought to be reviewed.

The trial court entered final orders sustaining the defendants' Motion to Dismiss on July 20, 1981, from which final order the plaintiffs appealed to the Court of Appeals of Georgia.

The Court of Appeals of Georgia, in a decision rendered on April 21, 1982, upheld the dismissal of the complaint by plaintiffs on the ground that there has been no waiver of sovereign immunity by legislation or otherwise or by court decree in order that the suit filed by plaintiffs may be maintained, holding that Ga.Code. Secs. 95A-304 and 95A-305 do not constitute consent of the sovereign to allow the Department of Transportation to be sued in a wrongful death action such as filed by plaintiffs.

On May 19, 1982, the Court of Appeals entered an order denying a motion by the Appellees for a rehearing.

On June 24, 1982, the seven member Supreme Court of Georgia denied without opinion the Writ of Certiorari to the Court of Appeals of Georgia to review the decision of the Court of Appeals of Georgia upholding the dismissal of

Appellees' complaint by the Superior Court of Chatham County, Georgia, with two Justices dissenting.

(c) Statute Conferring Jurisdiction.

The jurisdiction of the Supreme Court of the United States is conferred by Title 28 United States Code Section 1257(2) permitting review by the Supreme Court of the United States of final judgments rendered by the highest court of a state in which a decision could be had by appeal where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution and the decision is in favor of its validity.

V.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this case are the Fifth and

Fourteenth Amendments to the Constitution of the United States, the text of which is found in the Appendix to this Jurisdictional Statement.

VI.

STATUTES INVOLVED

The statutes involved are Ga. Code Secs. 95A-304 and 95A-305, and Ga. Code Sec. 69-301 also set forth in the Appendix to this Jurisdictional Statement.

VII.

STATEMENT OF THE CASE

The Appellants filed their complaint for damages against the Appellees in the Superior Court of Chatham County, Georgia, seeking damages for the negligent design, construction and maintenance by the Department of Transportation of a bridge that is part of the Georgia State Highway System and against the other defendants for

negligence in failing to warn their decedent of ice on a bridge in Chatham County that the defendants negligently allowed to accumulate that caused the decedent to lose control and wreck her vehicle as she was passing over this bridge that resulted in the death of their decedent. This damage claim also was based on the claim that the defective and hazardous condition of this bridge created a nuisance that rendered the bridge unsafe for public travel. The defendants all filed motions to dismiss the complaint of plaintiff with one of the grounds asserted by each of the defendants being that the defendants may not be sued without express consent of the sovereign State of Georgia and this consent had not been given for the suit filed by plaintiffs. The sovereign immunity question was first raised in the court of first instances by the Motion to

Dismiss filed by defendants that was sustained by the trial court by granting the Motion to Dismiss on the ground of sovereign immunity in its Order of July 20, 1981. The appellants raised the question of the constitutionality of the invoking of sovereign immunity under the facts of this case in their Enumeration of Errors and their brief filed in the Court of Appeals of Georgia seeking to reverse the dismissal of Appellees' suit or complaint on the ground of sovereign immunity.

VIII.

STATEMENT OF REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

The question presented on this appeal has never been past upon by this court and is of great public importance to the citizens of the State of Georgia who are being denied claims against the

Department of Transportation and the respective counties of the State of Georgia based on negligences resulting in injuries caused by negligent design, construction and maintenance of bridges that are part of the Georgia State Highway System by reason of the statutes of Georgia not holding the Georgia Department of Transportation and counties of the State of Georgia liable for negligence in the performance of their ministerial duties when the statutes of the State of Georgia hold municipal corporations liable for their negligence in the performance of ministerial duties and permit suit against municipal corporations such negligence that is denied citizens of Georgia where the Department of Transportation and a county is involved. The application of these laws are not equal and deny citizens of the State of Georgia due process of law

in damage claims against the Department of Transportation and the counties of the State of Georgia not denied citizens who have identical claims against municipalities of the State of Georgia. This question should now be determined by the Supreme Court of the United States since the Supreme Court of Georgia itself is divided in its decision denying the Writ of Certiorari in this case.

The appellants suggest that under these circumstances the question should not be considered with out plenary consideration, with briefs on the merit and oral arguments for its resolution.

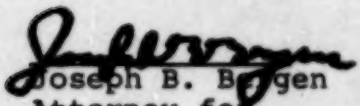
IX

CONCLUSION

The question presented by this appeal is substantial and of public importance. The case is one of first impression and probable jurisdiction of

this court should be noted.

Respectfully



Joseph B. Bergen
Attorney for
Appellants

X

SUPREME COURT OF THE UNITED STATES

JOSEPH P. COUNIHAN, JR.,
As Temporary Administrator of
the Estate of ANNE FAHEY COUNIHAN,
Deceased, for the benefit of said
Estate and himself individually, and
ANNE COUNIHAN, SHELIA COUNIHAN WINDERS,
and DEBRA COUNIHAN CARROLL,

Appellants,

vs.

DEPARTMENT OF TRANSPORTATION OF
GEORGIA; CHATHAM COUNTY COMMISSIONERS;
JOE E. LAMBBRIGHT, Individually and as
Chatham County Administrator; HUDSON
WISE, Individually and as Administrator
of Chatham County Public Works; and AL
ST. LAWRENCE, Individually and as Chief
of Chatham County Police,

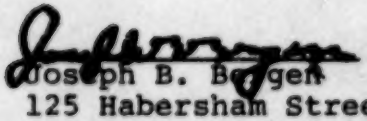
Appellees.

ENTRY OF APPEARANCE

The Clerk will please enter my appearance as Counsel for JOSEPH P. COUNIHAN, JR.,as Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, for the benefit of said Estate and himself individually, and for the

benefit of JOSEPH P. COUNIHAN, ANNE COUNIHAN, SHEILA COUNIHAN WINDERS, and DEBRA COUNIHAN CARROLL, who, in this Court, are Appellants.

I certify that I am a member of the Bar of the Supreme Court of the United States.



Joseph B. Bergen
125 Habersham Street
Savannah, Georgia
31401
912/233-6600

PROOF OF FILING AND SERVICE

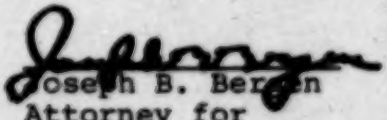
I, the undersigned JOSEPH B. BERGEN, Attorney of Record for the Appellants and a member of the Bar of the Supreme Court of the United States, depose and say that on the 22nd day of September, 1982, I filed 40 copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States with Mr. Alexander L. Stevas, Clerk of the Supreme Court of the United States and I served three copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the Honorable Michael J. Bowers, Attorney General of the State of Georgia, whose Post Office address is: 132 State Judicial Building, Atlanta, Georgia, 30334, and Fred S. Clark, Esquire, Chatham County Attorney, whose Post Office address is: Lee and Clark, Post Office Box 8205, Savannah, Georgia,

31412, who are all the parties required to be served, by placing said copies of said Jurisdictional Statement in an authorized depository for mail at the United States Post Office at Savannah, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for

filing to Messrs. Stevas and Bowers

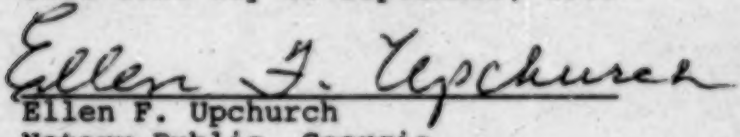
and by hand delivery to Mr. Clark.

This 22nd day of September, 1982.



Joseph B. Bergen
Attorney for
Appellants

Sworn to and subscribed before me
This 22nd day of September, 1982



Ellen F. Upchurch
Notary Public, Georgia

[Notarial Seal]
My commission expires: October 13, 1985.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF GEORGIA

APRIL 21, 1982

January

AFFIRMED

63246. COUNIHAN v. DEPARTMENT OF TRANSPORTATION OF GEORGIA et al.

McM-10

McMURRAY, Presiding Judge.

This is a wrongful death action filed by the temporary administrator of the estate of the deceased who was killed in Chatham County in a motor vehicle collison when decedent's automobile slid on ice and was struck by several other vehicles. The named defendants were the department of Transportation of Georgia, Chatham County, i.e., Chatham County Commissioners, the administrator of Chatham County Public Works, individually and in that capacity, and the Chief of Chatham County Police, individually and in his capacity as chief of the county police. The deceased allegedly met her death as she approached the Bull

River Bridge located on a highway within the County of Chatham, State of Georgia, when she lost control of her vehicle as the result of ice which the defendants had allegedly negligently allowed to accumulate on the roadway causing the collison with the bridge and other vehicles, the decedent suffering fatal injuries as the result of same.

The suit against the Department of Transportation is based upon Code Ann. SS 95-304 and 95A-305 (Ga. L. 1972, pp. 947, 983; 1974, pp. 1422, 1428), which has reference to suits directly against the department, as well as the liability of the department for certain suits against counties.

In addition to the answers filed denying the claims both the Department of Transportation and the Chatham County Commissioners filed motions to dismiss based upon sovereign immunity. After consideration of the motions to dismiss, in two separate orders, the trial court dismissed the action based on the ground of sovereign immunity as to the Department of Transportation and as to the remaining defendants, county

commissioners, county police chief, county administrator and county public work chief, on the same ground. Plaintiff appeals.

Held:

1. It is elementary that one cannot sue the state without the state's consent. However, it is the contention of the plaintiff that Code Ann. §§ 95A-304, and 95A-305, supra, constitutes the consent of the sovereign to allow the Department of Transportation to be sued in a wrongful death action such as here. We cannot agree based upon such cases as Tounsel v. State Highway Department of Georgia, 180 Ga. 112, 116 (178 SE 285); State Highway Department of Georgia v. McClain, 216 Ga. 1, 6(114 SE2d 125); Sikes v. Candler County, 247 Ga. 115 (247 SE2d 464); Mayor &c. of Savannah v. Palmerio, 242 Ga. 419 (249 SE2d 224); Miree v. United States of America, 242 Ga. 126 (249 SE2d 573); Crowder v. Department of State Parks, 228 Ga. 436, 439, 440 (185 SE2d 908). Compare National Distributin Company, Inc. v. Department of Transportation, 157 Ga. App. 789 (278 SE2d 648), affd. s.c. 248 Ga. 451 (283 SE2d 470) (said case involving an ex contractu action rather than ex delicto).

2. The above and foregoing cases with reference to the Department of Transportation, as a subdivision of the state, likewise applies to the County of Chatham, i.e., the Chatham County Commissioners, as representatives of the state in their official capacity. See Revels v. Tift County, Georgia, 235 Ga. 333 (219 SE2d 445); Crowder v. Department of State Parks, 228 Ga. 436, 439 (2), supra; Roberts v. Barwick, 187 Ga. 691 (2), 695 (1 SE2d 713). Compare Duffield v. Dekalb County, 242 Ga. 432 (249 SE2d 235). We are of the opinion that the law still is that there has been no waiver of sovereign immunity by legislation or otherwise in the case sub judice may be maintained.

3. The three other officials of Chatham County in their official capacity was also considered. Under the above authority, we see no error in the court to dismissing the complaint as to them in their capacity as officials of the county. That is, as "County Police Chief, County Administrator and County Public Works Chief." We presume that there has been no dismissal of the defendants sued in their individual capacity and make no ruling thereon.

Until such time as the General Assembly or

the case law authorizes such a suit against the state we are bound by the above decisions and find no authority in the briefs which would authorize us to reverse the trial court.

Judgment affirmed. Banke and Birdsong, JJ., concur.

APPENDIX "B"

ORDER BY COURT OF APPEALS OF GEORGIA DENYING REHEARING

COURT OF APPEALS
OF THE STATE OF GEORGIA Atlanta, May 19, 1982

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

63246 J.P. Counihan, Jr., Adm'r. v. Department of Transportation of Georgia et al

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA May 19, 1982

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Alton Hawk, Clerk

APPENDIX "C"

NOTICE OF THE SUPREME COURT OF GEORGIA DENYING THE WRIT OF CERTIORARI

Clerk's Office, Supreme Court of Georgia

Atlanta June 24, 1982

Case No. 38870. Counihan, Admr. v. Department of Transportation of Georgia et al.

The Supreme Court of Georgia today denied the writ of certiorari in this case.

All the justices concur, except Hill, P.J., and Smith, J., dissent.

Very truly yours,

Mrs. Joline B. Williams, Clerk

APPENDIX "D"

CONSTITUTIONAL PROVISIONS INVOLVED

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

AMENDMENT V-Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE FOURTEEN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

AMENDMENT XIV.-Citizenship; Privileges and Immunities; Due Process; Equal Protection: Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

APPENDIX "E"

STATUTES INVOLVED

95A-304 SUITS BY OR AGAINST THE DEPARTMENT

(a) SUITS AND SETTLEMENT OF CLAIMS

The department shall have the authority to bring suits, and it may be sued in such actions as permitted by law. In addition, the department may adjust and make settlement of any and all claims presented to it under oath.

(b) VENUE AND SERVICE OF PROCESS

All suits brought ex contractu by or against the department shall be brought in a county where any part of the work is to be or has been performed. All other suits by or against the department shall be brought in the county in which the cause arose. Service upon the department shall be sufficient by serving a second original process issued from the county where the suit is filed, upon the Commissioner of the Department of Transportation personally or by leaving a copy of the same in the office of the Commissioner in the State Highway Building, Atlanta, Georgia.

(Acts 1973, pp. 947, 983; 1974, pp. 1422, 1428.)

95A-305 LIABILITY OF DEPARTMENT FOR CERTAIN SUITS AGAINST COUNTIES

(a) SUIT FOR DAMAGES IN CAUSE ACTION ACCRUING ON PUBLIC ROAD TAKEN OVER BY DEPARTMENT

The Department of Transportation shall defend any suit, and be responsible for all damages awarded therein, in any court of this State against any county under existing laws whenever the cause of the action accrues on a public road which at the time of accrual had been designated by the department as a part of the State Highway System: Provided, that no suit under this section may be brought until the construction of the public road on which the injury complained of occurred has been completed and such public road has been officially opened to traffic as provided in subsection (b) of this section. When any such suit is brought against a county in any court of this State, it shall be the duty of the plaintiff to provide for service of notice the pendency of such suit against the county upon the Department of Transportation by providing

for service of a second original process, issued from the court where the suit is filed, upon the Commissioner of the Department of Transportation personally or by leaving a copy of the same in the office of the Commissioner in the State Highway Building, Atlanta, Georgia. The service of process in such suit upon the county shall not be perfected until such second original process has been served as herein provided. The Department of Transportation shall also have the right and authority to defend, adjust, and settle in the name of such county and on its behalf any claim for damages for which the department ultimately may be liable under this Section.

(b) OFFICIAL OPENING OF ROAD TO PUBLIC

A public road shall be officially opened to traffic within the meaning of this section on the date that the department gives written notice to the contractor or political subdivision performing the work on such road of final acceptance of such work, or otherwise in writing acts so as to open traffic by the general public.

(acts 1973, pp. 947, 982.)

69-301 (897) MUNICIPAL CORPORATIONS LIABLE FOR WHAT

Municipal corporations shall not be liable for the failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they shall be liable.

(69 Ga. 542).

APPENDIX F

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

CASE NO. 63246
(Supreme Court of Georgia
Case No. 38870)

JOSEPH P. COUNIHAN, JR., As Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, for the benefit of said Estate and himself Individually, and for the benefit of JOSEPH P. COUNIHAN, ANNE COUNIHAN, SHEILA COUNIHAN WINDERS, and DEBRA COUNIHAN CARROLL,

Appellants,

VS.

DEPARTMENT OF TRANSPORTATION OF GEORGIA; CHATHAM COUNTY COMMISSIONERS; JOE E. LAMBRIGHT, Individually, and as Chatham County Administrator; HUDSON WISE, Individually and as Administrator of Chatham County Public Works; and AL ST. LAWRENCE, Individually and as Chief of Chatham County Police,

Appellees.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that JOSEPH P. COUNIHAN JR., Administrator, et

al., the Appellants in the above styled case, hereby appeal to the Supreme Court of the United States from the final judgment entered by the Court of Appeals of Georgia on April 21, 1982, upon which rehearing was denied by the Court of Appeals of the State of Georgia on May 19, 1982, and application for the Writ of Certiorari in the Supreme Court of Georgia was denied by the Supreme Court of Georgia on June 24, 1982. Said decision of the Court of Appeals affirmed a Motion to Dismiss entered by the Superior Court of Chatham County, Georgia, entered on July 20, 1981, dismissing the complaint of plaintiffs against the defendants in the court below on the ground that defendants are protected from the claim of plaintiffs by sovereign immunity.

II. The Appellants appeal from the full judgment of the Court of Appeals of Georgia entered on April 21, 1982, that became a final judgment on June 24, 1982, upon denial of the Writ of Certiorari by the Supreme Court of Georgia, pursuant to Title 28 USC Sec. 1257(2), on the ground that said decision of the Court of Appeals of Georgia was in favor of the validity of a State statute, as codified in Ga. Code Ann. Secs. 95A-304 and 95A-305 (Ga. Laws 1973, pp. 947, 983; 1974 pp.1422,1428), that Appellant contends is repugnant to the Constitution of the United States.

III. The Clerk of the Supreme Court of Georgia will please prepare the entire record in this cause to certify said record and provide for the transmission of this record to the Supreme Court of

the United States, and include in said record the following:

1. Complaint filed November 6, 1979.

2. Answer of Department of Transportation of Georgia, dated June 20, 1980.

3. Defenses and Answer of defendants Chatham County Commissioners, Joe E. Lambright, Hudson Wise and Al St. Lawrence, filed June 24, 1980.

4. Motion to Dismiss filed by the Department of Transportation on Match 26, 1981.

5. Motion to Dismiss filed by Chatham County Commissioners on March 26, 1981.

6. Order dismissing the Department of Transportation, dated July 20, 1981.

7. Order dismissing defendants Chatham County Commissioners, County Police Chief, County Administrator and

County Public Works Chief, dated July 20, 1981.

8. Decision of the Court of Appeals dated
April 21, 1982.

9. Copy of Order entered by the Court of Appeals of Georgia on May 19, 1982, denying Motion for Rehearing.

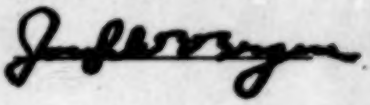
10. Copy of Notice from the Clerk of the Supreme Court of Georgia that the Supreme Court of Georgia denied the Writ of Certiorari to the Court of Appeals of Georgia, dated June 24, 1982.

11. Copy of this Notice of Appeal to Supreme Court of the United States dated September 20, 1982.

12. Proof of Service.

September 22, 1982.

JOSEPH B.BERGEN
Attorney for
Appellants



125 Habersham Street
Savannah, Georgia 31401

912/233-6600

PROOF OF FILING AND SERVICE

I, the undersigned JOSEPH B. BERGEN, Attorney of Record for the Appellants and a member of the Bar of the Supreme Court of the United States, depose and say that on the 22nd day of September, 1982, I filed the original foregoing Notice of Appeal to the Supreme Court of the United States with Mr. Alton Hawk, Clerk of the Court of Appeals of Georgia, whose Post Office Address is: 433 State Judicial Building, Atlanta, Georgia, 30334, and I served three copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Honorable Michael J. Bowers, Attorney General of the State of Georgia, whose Post Office address is: 132 State Judicial Building, Atlanta, Georgia, 30334, and Fred S. Clark, Esquire, Chatham County Attorney, whose address is: Lee and Clark, Post

Office Box 8205, Savannah, Georgia, 31412, and also one copy of said notice on Mrs. Joline Williams, Clerk of the Supreme Court of Georgia,whose post office address is: 433 State Judicial Building, Atlanta, Georgia, 30334, who are all the parties required to be served, by placing said copies of said Notice of Appeal in an authorized depository for mail at the United States Post Office at Savannah, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for

filing to Messrs. Hawk and Bowers and Mrs. Williams and by hand delivery to Mr. Clark.

This 22nd day of September, 1982.

Joseph B. Bergan
Attorney for
Appellants

Sworn to and subscribed before me
This 22nd day of September, 1982

Ellen F. Upchurch
Notary Public, Georgia

[Notarial Seal]
My commission expires: October 13, 1985.

Office - Supreme Court, U.S.
FILED
OCT 20 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH P. COUNIHAN, JR., As Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, et al.,

Appellants,

v.

DEPARTMENT OF TRANSPORTATION OF GEORGIA, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

MOTION TO DISMISS OR TO AFFIRM

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

ROLAND F. MATSON
Senior Assistant
Attorney General

MICHAEL E. HOBBS
Assistant Attorney General

132 State Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-3360

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NO. 82-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH P. COUNIHAN, JR., As
Temporary Administrator of the
Estate of ANNE FAHEY COUNIHAN,
Deceased, et al.,

Appellants,

v.

DEPARTMENT OF TRANSPORTATION
OF GEORGIA, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

MOTION TO DISMISS OR TO AFFIRM

The Department of Transportation, an agency of the State of Georgia, named as an Appellee herein, respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Georgia, on which judgment the Supreme Court of Georgia denied a Writ of Certiorari, on the grounds that this appeal does not raise a substantial federal question; that the issues raised in this appeal were not timely or properly raised in the lower courts and were not expressly ruled upon; and that the judgment in this case rests upon an adequate non-federal basis.

QUESTIONS PRESENTED

1.

Whether Appellant's appeal presents a substantial federal question.

2.

Whether the questions presented in Appellant's Jurisdictional Statement were timely or properly raised and expressly passed on by the state appellate court.

3.

Whether the judgment appealed from rests on an adequate non-federal basis.

STATEMENT OF THE CASE

Appellant attacks the constitutionality of two Georgia statutes on the grounds that they allegedly deny due process of law and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article II, Sections I and II of the Constitution of the State of Georgia of 1976. (Ga. Code Ann. Sections 2-101 and 2-203). The statutes under attack (Ga. Laws 1973, pp. 947, 983, as amended [Ga. Code Ann. §§ 95A-304 and 95A-305]) relate to the ability of the Department of Transportation to bring suits and be sued in such actions as are permitted by law. These statutes further provide that the Department shall defend certain actions which are brought against counties of the State of Georgia on causes of action arising upon public roads which are part of the State Highway System.

Appellant claims that these statutes are unconstitutional in light of another statute of this State which provides for the liability of municipalities negligent in the performance

of their ministerial duties. (Ga. Code § 69-301).

The factual setting, briefly stated, is as follows: Appellant brought suit against the Department of Transportation, Chatham County, Georgia, and several individual employees of Chatham County seeking damages for the alleged wrongful death of Appellant's decedent. The circumstances surrounding the death were that the decedent lost control of her vehicle on an allegedly icy bridge, and Appellant alleged this condition was the result of the negligence of the various Appellees herein.

The Department of Transportation filed a Motion to Dismiss the wrongful death action against it on the ground that it was immune from this suit under the doctrine of sovereign immunity. This Motion was unopposed. Appellant, for the first time on appeal, sought to defend against this immunity by contending that Georgia Code Annotated Sections 95A-304 and 95A-305 amounted to a waiver of the Department's sovereign immunity and that these sections expressly authorized the action *sub judice*.

As evidenced by the decision of the Georgia Court of Appeals (erroneously attributed to the Supreme Court of Georgia in Appendix "A" of the Appellant's Jurisdictional Statement), Appellant was unsuccessful in his assertion that these statutes amounted to a waiver of sovereign immunity.

For the first time in his appeal to the Georgia Court of Appeals, Appellant alternatively sought to raise, in a very superficial manner, the constitutionality of Georgia's sovereign immunity. Appellant merely contended that to allow an action against a municipality for negligence arising out of its ministerial duties but not to allow a similar action against the State itself, or a county thereof,

constitutes a denial of due process and equal protection. This issue was not expressly ruled upon by the Georgia Court of Appeals. *See* Appendix "A" of Appellant's Jurisdictional Statement.

Appellant sought a writ of certiorari from the Supreme Court of Georgia to the Court of Appeals of Georgia. This application was denied. *See* Appendix "C" to Appellant's Jurisdictional Statement.

A. THE APPEAL DOES NOT PRESENT THIS COURT WITH A SUBSTANTIAL FEDERAL QUESTION.

Under the doctrine of sovereign immunity, suits cannot be maintained against the State of Georgia or any of its agencies unless the State has given express legislative consent to such suits. *Crowder v. Department of State Parks*, 228 Ga. 436 (1971), *cert. denied*, 406 U.S. 914 (1972); *Maddox v. Coogler*, 224 Ga. 806 (1968); *Azizi v. Board of Regents of the University System*, 132 Ga. App. 384 (1974), *cert. denied*, 233 Ga. 487 (1975); *Erbel v. Forrester*, 194 Ga. 439 (1942); *Roberts v. Barwick*, 187 Ga. 691 (1939); *Counihan v. Department of Transportation*, 162 Ga. App. 374 (1982); *National Distributing Company, Inc. v. Department of Transportation*, 157 Ga. App. 789, *aff'd* 248 Ga. 451 (1981); *Goolsby v. Regents of the University System*, 141 Ga. App. 605 (1977); *Meadows Motors, Inc. v. Department of Administrative Services*, 141 Ga. App. 224 (1977); *National Distributing Co. v. Oxford*, 103 Ga. App. 72 (1961). The firm foundation that the doctrine of sovereign immunity has in Georgia by these judicial rulings has now been given constitutional status. *Clark v. State of Georgia*, 240 Ga. 188 (1977); *Azizi v. Board of Regents of the University System*, 233 Ga. 487, 488 (1975).

The applicability of the doctrine of sovereign immunity to the Department of Transportation (formerly State Highway Department) has long been recognized by the courts of Georgia. *Tounsel v. State Highway Department*, 180 Ga. 112, 116 (1934); *State Highway Department v. Barrett*, 124 Ga. App. 703 (1971); *Andrews v. Department of Transportation*, 133 Ga. App. 78 (1974); *Palmerio v. Mayor &c of Savannah*, 145 Ga. App. 429, 432 (1978); *Sikes v. Candler County*, 247 Ga. 115 (1981); *National Distributing Co., Inc. v. Department of Transportation*, 157 Ga. App. 789 (1981). Furthermore, it has consistently been held by the courts of Georgia that neither Georgia Code Annotated Section 95A-304 nor Georgia Code Annotated Section 95A-305 constitutes a waiver of the Department of Transportation's sovereign immunity in tort lawsuits. These are the very statutes which Appellant seeks to bring under constitutional scrutiny.

In *Andrews v. Department of Transportation*, 133 Ga. App. 78 (1974), it was argued that Georgia Code Annotated Section 95A-304 (*see* Appendix "E" of Appellant's Jurisdictional Statement) "shows a clear legislative intent to waive the doctrine of sovereign immunity as to the Department of Transportation." 133 Ga. App. at p. 79. The court disagreed, holding that the section was nothing more than a codification of the holding in *Tounsel v. State Highway Department*, 180 Ga. 112, 119 (1935), and was not intended by the General Assembly to waive the Department's immunity. There is no law in existence in the State of Georgia permitting suits against the Department of Transportation in tort. *See Sikes v. Candler County*, 247 Ga. 115 (1981). However, the Department may be sued and held liable for taking or damaging private property for public purposes without payment of just com-

pensation. Article I, Section III, Paragraph I of the Constitution of Georgia of 1976 (Ga. Code Ann. § 2-301). Likewise, the language of Georgia Code Annotated Section 95A-305 (formerly Section 95-1710) does not constitute a waiver of a county's immunity from liability because that Code Section specifically limits liability for damages "under existing laws." *Williams v. Georgia Power Co.*, 233 Ga. 517, 518 (1975).

In *Beers v. State of Arkansas*, 61 U.S. 527 (1857), Mr. Justice Taney stated:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *Beers v. State of Arkansas*, 61 U.S. 527 at p. 529.

It is submitted that Georgia, by enacting Georgia Code Annotated Sections 95A-304 and 95A-305, has done precisely what this Court was considering in the above-quoted language from *Beers*, *supra*. Georgia Code Annotated Section 95A-304 provides that the Department of Transportation may be sued in "such actions as are permitted by law." Georgia Code Annotated Section 95A-305 sets out the exclusive procedure for suing the Department of Transportation. *Sikes v. Candler County*, 247 Ga. 115 (1981).

This Court has held that such matters are strictly within the purview of state law and do not require the inter-

vention or scrutiny of this Court. In *Palmer v. State of Ohio*, 248 U.S. 42 (1918), this Court was called upon to construe the following language of the Ohio Constitution:

> "Suits may be brought against the State in such Courts and in such manner as may be provided by law." Compare with Ga. Const., Art. IV, Sec. V, Par. I (Ga. Code Ann. § 2-3401) and Ga. Laws 1973, pp. 947, 983, as amended (Ga. Code Ann. § 95A-304).

In *Palmer, supra*, this Court held as follows:

> "The State Supreme Court held that this amendment is not self-executing, and that the General Assembly of the State having failed to designate the Courts and the manner in which such suits might be brought, effective consent to sue had not been given. This decision, the plaintiffs in error claim, vaguely and indefinitely, somehow deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.
>
> "The right of individuals to sue a State, in either a federal or state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers v. Arkansas*, 20 How. 527; *Railroad Company v. Tennessee*, 101 U.S. 337; *Hans v. Louisiana*, 134 U.S. 1. Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which the decision of the State Supreme Court is controlling with this court, no federal right being involved. *Elmendorf v. Taylor*, 10 Wheat. 152, 159; *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 116; *Memphis Street Ry. Co. v. Moore*, 243 U.S. 299, 301.
>
> "The further claim that the plaintiffs in error are deprived of their property without compensation in

violation of the Fifth Amendment to the Constitution of the United States, is palpably groundless. *Barron v. Baltimore*, 7 Pet. 243, 250; *Brown v. New Jersey*, 175 U.S. 172, 174.

"No federal question being presented by the record, the motion to affirm is denied and this court, *sua sponte*, dismisses the writ of error for want of jurisdiction." *Palmer v. State of Ohio*, 248 U.S. 32, at pp. 33 and 34.

Because the grant or denial of permission to sue the sovereign State is a matter which addresses itself purely to the legislative grace of the State, no federalqu estion can arise. This privilege, when conferred, does not arise under the Constitution or laws of the United States, and neither does denial of this privilege. This being a matter of legislative grace, no denial of due process of law can exist, there being no federal rights to be protected.

Nor can there be a denial of equal protection by the application of Georgia Code Annotated Sections 95A-304 and 95A-305, when considered in light of Georgia Code Section 69-301 (*see* Appendix "E" to Appellant's Jurisdictional Statement). This latter statute applies only to municipal corporations, not to counties or the State itself. There is a broad legal distinction between the sovereign State of Georgia, its agencies and counties on the one hand and municipal corporations on the other. The Department, as an agency of the State, is an agent or servant of the State; it is part of the sovereign itself. *Tounsel v. State Highway Department*, 180 Ga. 112, 116 (1935).

" 'Counties are subdivisions of the state government to which the state parcels its duty of governing the people . . . and are arms of the state, created, organized, and existing for civil and political purposes,

> particularly for the purpose of administering locally the general powers and policies of the state. On the other hand, municipalities are creatures of the legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature. [Cits.]' *Troup County Electric Membership Corp. v. Ga. Power Co.*, 229 Ga. 348, 352 (1972)." *Miree v. United States*, 242 Ga. 126, 133 (1978).

Because of the vast distinction between municipal corporations and the sovereign, there can be no denial of equal protection by permitting limited suits against municipalities which are not permitted against the sovereign itself. Georgia Code Section 69-301 is not more than a codification of common law principles laid down in Georgia. *Collins v. The Mayor &c. of Macon*, 69 Ga. 542 (1882); *Rivers v. City Council of Augusta*, 65 Ga. 376 (1880). Neither the common law of Georgia, nor the statutory law of this State, has ever recognized a limited liability for the State or counties similar to that of municipalities contained in Georgia Code Section 69-301.

It is clear that the legislature may withhold permission to sue the State or its agencies, this being a mere privilege, with no attendant denial of equal protection of the law. *See Beers v. State of Arkansas*, 61 U.S. 527, 529 (1857).

B. THE QUESTION PRESENTED WAS NOT TIMELY OR PROPERLY RAISED AND WAS NOT EXPRESSLY PASSED ON BY THE COURT BELOW.

It is submitted that the question Appellant seeks to raise in this Appeal was never properly raised in the state courts, as required by Rule 16.1(b) of this Court. As can be seen in the record of this case, the issue of whether

Georgia Code Annotated Sections 95A-304 and 95A-305 violate due process and equal protection in light of Georgia Code Annotated Section 69-301 was never raised by Appellant. Rather, Appellant sought to attack the doctrine of sovereign immunity directly on these grounds. Even this constitutional attack was not launched until the case had reached the Georgia Court of Appeals. This rendered the constitutional attack untimely under Georgia law. *Allison v. Fulton-DeKalb Hospital Authority*, 245 Ga. 445 (1980); *Yield, Inc. v. City of Atlanta*, 239 Ga. 578 (1977). As held in *Palmer v. Ohio*, 248 U.S. 32 (1918), this untimely attack was palpably groundless.

Furthermore, neither the Court of Appeals of Georgia, nor the Supreme Court of Georgia, expressly ruled upon the precise question raised by the Appellant in his Jurisdictional Statement.

In view of the attempt by Appellant to raise this issue for the first time on appeal to this Court, it is respectfully submitted that this Court lacks jurisdiction to entertain this matter. *Orr v. Orr*, 440 U.S. 268, 274 (1978); *Edelman v. California*, 344 U.S. 357, 358 (1952); *see also*, C. Wright, *Federal Courts* 541-542.

C. THE JUDGMENT APPEALED FROM RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

In *Herb v. Pitcairn*, 324 U.S. 117 (1944), this Court stated:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [cits.] . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

Herb v. Pitcairn, 324 U.S. 117 at pp. 125 and 126.

With this principle in mind, the Court's attention is again directed to the explicit words of this Court in *Palmer v. Ohio*, 248 U.S. 32 (1918):

> "The right of individuals to sue a State, in either a federal or state court cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers v. Arkansas*, 20 How. 527 (61 U.S. 527) (1857); *Railroad Company v. Tennessee*, 101 U.S. 337; *Hans v. Louisiana*, 134 U.S. 1. Whether Ohio gave the required consent must be determined by the construction given to the constitutional amendment quoted, and this is a question of local state law . . . *no federal right being involved.*" *Palmer v. Ohio*, 248 U.S. 32 at p. 34. (Emphasis added).

The Appellant would have this Court find a federal question where clearly none exists. State sovereign immunity is, and always has been, a matter of state law; and the waiver of that immunity is entirely up to the State involved. Simply stated, sovereign immunity and the conditions under which it may be waived do not involve any federal rights which could invoke the jurisdiction of this Court.

CONCLUSION

Appellant's appeal does not involve any substantial federal questions. Appellant attempts to create a federal question by claiming that the distinction between the sovereignty of the State and its counties on the one hand and the status of municipal corporations on the other, with relation to their respective sovereign and governmental immunities, is invalid as a denial of equal protection and due process of law under the United States Constitution. This claim is wholly without merit.

The major thrust of Appellant's case in the lower State appellate courts was that the doctrine of sovereign immunity was violative of the due process and equal protection clauses of the Fourteenth Amendment, not that Georgia Code Annotated Sections 95A-304 and 95A-305 were unconstitutional, as Appellant now claims. As seen by the decision of the Court of Appeals of Georgia, Appellant originally claimed that these two sections constituted a *waiver* of the Department of Transportation's sovereign immunity.

It is submitted that the real intent of Appellant in this case is to attack state and county sovereign immunity in Georgia and not the two statutes facially under attack. A similar attack was made upon the sovereign immunity of Pennsylvania in *O'Neill v. Pennsylvania*, 459 F.2d 1 (3rd Cir. 1972). Therein the Circuit Court of Appeals held as follows:

> "The appellants would have us find federal question jurisdiction, 28 U.S.C. § 1331, on the basis of their claim that the doctrine of sovereign immunity is a violation of the due process and equal protection clauses of the fourteenth amendment. . . . In any event the fourteenth amendment claim seems frivolous in view of *Palmer v. Ohio*, 248 U.S. 32, 34, 39 S.Ct. 16, 63 L.Ed. 104 (1918)." *O'Neill v. Pennsylvania*, 459 F.2d 1 at p. 2.

It is urged that the Appellant's appeal in this case, both as to the constitutionality of the Georgia statutes and as to Appellant's real intent, i.e. the destruction of sovereign immunity in Georgia, is similarly without merit.

Finally, as shown above, the Appellant failed to properly raise the constitutional issues in accordance with the law of Georgia, having raised them for the first time on appeal. As seen by the decision appealed from, the State

court has not expressly ruled upon the question presented by the Appellant in his Jurisdictional Statement.

Respectfully submitted this 18th day of October, 1982.

/s/
MICHAEL J. BOWERS
Attorney General

/s/
ROBERT S. STUBBS II
Executive Assistant
Attorney General

/s/
MARION O. GORDON
First Assistant
Attorney General

/s/
ROLAND F. MATSON
Senior Assistant
Attorney General

/s/
MICHAEL E. HOBBS
Assistant Attorney General

132 State Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-3360

132 State Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-3363

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter, pursuant to Rule 28(c) of the Rules of the Supreme Court of the United States, and counsel for all other parties, with copies of "Motion to Dismiss or to Affirm" by depositing same in the United States Mail with sufficient postage for first class delivery in envelopes properly addressed to:

Mr. Joseph B. Bergen
Attorney at Law
125 Habersham Street
Savannah, Georgia 31401

Mr. Fred S. Clark
Chatham County Attorney
Lee & Clark
P. O. Box 8205
Savannah, Georgia 31412

This 18th day of October, 1982.

132 State Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-3360

By
ROLAND F. MATSON
Senior Assistant
Attorney General

82-519

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH P. COUNIHAN, JR., As Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, et al,

APPELLANTS,

Vs.

DEPARTMENT OF TRANSPORTATION OF GEORGIA; CHATHAM COUNTY COMMISSIONERS; JOE E. LAMBRIGHT, Individually and as Chatham County Administrator; HUDSON WISE, Individually and as Administrator of Chatham County Public Works; and AL ST. LAWRENCE, Individually and as Chief of Chatham County Police,

APPELLEES.

CASE NUMBER 82-519

MOTION TO DISMISS OR TO AFFIRM

FRED S. CLARK, ESQUIRE
CHATHAM COUNTY ATTORNEY
P. O. Box 8161
Savannah, Georgia 31412

(912) 944-4646

ATTORNEY FOR APPELLEES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH P. COUNIHAN, JR., As Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, et al,

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Vs.

DEPARTMENT OF TRANSPORTATION OF GEORGIA; CHATHAM COUNTY COMMISSIONERS; JOE E. LAMBRIGHT, Individually and as Chatham County Administrator; HUDSON WISE, Individually and as Administrator of Chatham County Public Works; and AL ST. LAWRENCE, Individually and as Chief of Chatham County Police,

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FRED S. CLARK, ESQUIRE
CHATHAM COUNTY ATTORNEY
P. O. Box 8161
Savannah, Georgia 31412

(912) 944-4646

ATTORNEY FOR APPELLEES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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Appellants,	)	
-v-	)	CASE NO. 82-519
DEPARTMENT OF TRANSPORTATION OF GEORGIA; CHATHAM COUNTY COMMISSIONERS; JOE E. LAMBRIGHT, Individually and as Chatham County Administrator; HUDSON WISE, Individually and as Administrator of Chatham County Public Works; and AL ST. LAWRENCE, Individually and as Chief of Chatham County Police,	)	
Appellees.	)	

ON APPEAL FROM THE
COURT OF APPEALS OF GEORGIA

MOTION TO DISMISS OR TO AFFIRM

The Chatham County Commissioners, Joe E. Lambright, Hudson Wise and Al St. Lawrence, named as Appellees herein, respectfully move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Georgia, on which judgment the Supreme Court of Georgia denied a Writ of Certiorari, on the grounds that this appeal does not raise a substantial federal question; and that the judgment in this case rests upon an adequate and valid State basis.

QUESTIONS PRESENTED

1.

Whether Appellant's appeal presents a substantial federal question.

2.

Whether the judgment appealed from rests on an adequate and valid State basis.

STATEMENT OF THE CASE

Appellant attacks the constitutionality of two Georgia statutes on the grounds that they allegedly deny due process of law and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article II, Sections I and II of the Constitution of the State of Georgia of 1976. (Ga. Code Ann. Sections 2-101 and 2-203). The statutes under attack (Ga. Laws 1973, pp. 947, 983, as amended [Ga. Code Ann. §§ 95A-304 and 95A-305]) relate to the ability of the change and other State governmental bodies to bring suits and be sued in such actions as are permitted by law. These statutes further provide that the Department of Transportation shall defend certain actions including those which are brought against counties of the State of Georgia on causes of action arising upon public roads which are part of the State Highway System.

Appellant claims that these statutes are unconstitutional in light of another statute of this State which provides for the liability of municipalities negligent in the performance of their ministerial duties. (Ga. Code § 69-301).

A concise statement of facts is as follows: Appellant brought suit against the Department of Transportation, Chatham County, Georgia, and individual employees of Chatham County seeking damages for the alleged wrongful death of Appellant's decedent. Appellant alleged that the decedent lost control of her vehicle on an allegedly icy bridge, and that this condition was the result of the negligence of the various Appellees herein.

Chatham County and Joe E. Lambright, Chatham County Administrator,

Hudson Wise, Administrator of Chatham County Public Works and Al St. Lawrence, Chief of Chatham County Police, filed a Motion to Dismiss the wrongful death action against it on the ground that it was immune from this suit under the doctrine of sovereign immunity. This Motion was unopposed. Appellant, on appeal, sought to defend against this immunity by contending that Georgia Code Annotated Sections 95A-304 and 95A-305 amounted to a waiver of the appellee's sovereign immunity and that these sections expressly authorized the action sub judice.

The decision of the Georgia Court of Appeals, refuted Appellant's assertion that these statutes amounted to a waiver of sovereign immunity.

A. THE APPEAL DOES NOT PRESENT THIS COURT WITH A SUBSTANTIAL FEDERAL QUESTION.

Under the Georgia Constitution and statutory provisions a County is immune from suit unless there is an express legislative waiver of this immunity. Code Sections 2-3401, 23-1502. The pleading against the County must show a statute which authorizes Plaintiff to bring the suit. "While it is true that a suit may now be maintained against a county in certain instances, still this cannot be done except when it is authorized by express statutory or constitutional provision; and it is incumbent upon the person filing the suit to show that his cause is within the legislative authority permitting such suit." Ayers v. Franklin County, 73 Ga. App. 207 (2) (36 SE2d 110).

From our adversary's brief it appears the statute relied upon by them is codified as § 95A-305(a). Their reliance is misplaced because this statute obviously was enacted only to require the Department of Transportation to defend and assume liability when a county is sued for a cause of action occuring on a road which is a part of the State Highway System. It is not a legislative waiver of sovereign immunity.

In fact, the Georgia Supreme Court specifically held in Revels

vs. Tift County, 235 Ga. 333 (219 SE2d 445) that sovereign immunity applies as to counties sued for alleged negligence and that Georgia Code § 23-1502 providing that "A county is not liable to suit for any cause of action unless made so by statute does not violate State or Federal Constitutions." In accord are DeKalb County vs. Dixion, 146 Ga. App. 573 (246 SE2d 692) and Mires vs. United States of America, 242 Ga. 126 (249 SE2d 573).

In Beers v. State of Arkansas, 61 U.S. 527 (1857), Mr. Justice Taney stated:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in an suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." Beers v. State of Arkansas, 61 U.S. 527 at p. 529.

It is submitted that Georgia, by enacting Georgia Code Annotated Sections 95A-304 and 95A-305, has done precisely what this Court was considering in the above-quoted language from Beers, supra. Georgia Code Annotated Section 95A-304 provides that the Department of Transportation may be sued in "such actions as are permitted by law."

This Court has held that such matters are strictly within the purview of state law and do not require the intervention or scrutiny of this Court. In Palmer v. State of Ohio, 248 U.S. 42 (1918), this Court was called upon to construe the following language of the Ohio Constitu-

tion:

"Suits may be brought against the State in such Courts and in such manner as may be provided by law." Compare with Ga. Const., Art. IV, Sec. V, Par. I (Ga. Code Ann. §2-3401) and Ga. Laws 1973, pp. 947, 983, as amended (Ga. Code Ann. §95A-304).

In Palmer, supra, this Court held as follows:

"The State Supreme Court held that this amendment is not self-executing, and that the General Assembly of the State having failed to designate the Courts and the manner in which such suits might be brought, effective consent to sue had not been given. This decision, the plaintiffs in error claim, vaguely and indefinitely, somehow deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

"The right of individuals to sue a State, in either a federal or state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. Beers v. Arkansas, 20 How. 527; Railroad Company v. Tennessee, 101 U.S. 337; Hans v. Louisiana, 134 U.S. 1.

"The further claim that the plaintiffs in error are deprived of their property without compensation in violation of the Fifth Amendment to the Constitution of the United States, is palpably groundless. Barron v. Baltimore, 7 Pet. 243, 250; Brown v. New Jersey, 175 U.S. 172, 174.

"No federal question being presented by the record, the motion to affirm is denied and this court, sua

sponte, dismisses the writ of error for want of jurisdiction." Palmer v. State of Ohio, 248 U.S. 32, at pp. 33 and 34.

Because the grant or denial of permission to sue the sovereign is a matter which addresses itself purely to the legislative grace of the State, no federal question arises. This privilege, when conferred, does not arise under the Constitution or laws of the United States, and neither does denial of this privilege. This being a matter of legislative grace, no denial of due process of law can exist, there being no federal rights to be protected.

Because of the vast distinction between municipal corporations and the sovereign, there can be no denial of equal protection by permitting limited suits against municipalities which are not permitted against the sovereign itself. Georgia Code Section 69-301 is not more than a codification of common law principles laid down in Georgia. Collins v. The Mayor and C. of Macon, 69 Ga. 542 (1882); Rivers v. City Council of Augusta, 65 Ga. 376 (1880). Georgia has never recognized a limited liability for the State or counties similar to that of municipalities contained in Georgia Code Section 69-301.

It is clear that the legislature may withhold permission to sue the State or its agencies, this being a mere privilege, with no attendant denial of equal protection of the law. See Beers v. State of Arkansas, 61 U.S. 527, 529 (1857).

B. THE JUDGMENT APPEALED FROM RESTS UPON AN ADEQUATE AND VALID STATE BASIS.

Once again we reiterate that:

"The right of individuals to sue a State, in either a federal or state court cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. Beers v. Arkansas, 20 How. 527 (61 U.S. 527)(1857);

Railroad Company v. Tennessee, 101 U.S. 337; Hans v. Louisiana, 134 U.S. 1. Whether Ohio gave the required consent must be determined by the construction given to the constitutional amendment quoted, and this is a question of local state law....no federal right being involved." Palmer v. Ohio, 248 U.S. 32 at P. 34. (Emphasis added).

Such authority affirms that the rulings of the Georgia trial and appellant Courts rest upon an adequate and valid State basis.

CONCLUSION

It is urged that the Appellant's appeal in this case, both as to the constitutionality of the Georgia statutes and as to Appellant's intent to invalidate soverein immunity in Georgia, be held to be without merit.

Respectfully submitted this 25th day of October, 1982.

CHATHAM COUNTY

Fred S. Clark

FRED S. CLARK
CHATHAM COUNTY ATTORNEY

P. O. Box 8161
Savannah, Georgia 31412
(912) 944-4646

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter, pursuant to Rule 28(c) of the Rules of the Supreme Court of the United States, and counsel for all other parties, with copies of "Motion to Dismiss or to Affirm" by depositing same in the United States Mail with sufficient postage for first class delivery in envelopes properly addressed to:

Mr. Joseph B. Bargen
Attorney at Law
125 Habersham Street
Savannah, Georgia 31401

Mr. Roland F. Matson
Senior Assistant
Attorney General
132 State Judicial Bldg.
Atlanta, Georgia 30334

This 15th day of October, 1982.

Fred S. Clark
FRED S. CLARK
CHATHAM COUNTY ATTORNEY

P. O. Box 8161
Savannah, Georgia 31412
(912) 944-4646